

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Leased Commercial Access) MB Docket No. 07-42
)
Development of Competition and Diversity)
In Video Programming Distribution and Carriage)

To: The Commission

COMMENTS OF CHARLES STOGNER, PRESIDENT L.A.P.A

These comments are submitted on behalf of Charles Stogner, in his role as President of the Leased Access Programmers Association (“LAPA”), filed in response to NCTA’s ‘request for a stay’.

In the opening paragraph of NCTA's request for a stay in the implementation of the new rules governing leased access, the association states; *"Rather than respecting the statutory directive to "assure" that commercial leased access use "will not adversely affect the operation, financial condition, or market development" of cable systems, the new formula was specifically intended to result in greater utilization of commercial leased access channels. In addition, the Order imposes sweeping new administrative burdens on cable operators."*

Of course, the new rules are intended to result in greater utilization of commercial leased access airtime, something the cable industry has deftly sidestepped since the law was created 24 years ago. Their contention is that the new maximum rate is

well below what the previous rules permitted. There are instances where cable offers airtime to non-leased users at rates below the now permitted rate; often on local origination channels in direct competition with leased access.

Additionally, NCTA apparently is overlooking that only days after the new rules were released by FCC; the Media Bureau released an order on a petition filed 11 months earlier and in the order, basically made the new rates and rules meaningless. In this order, the bureau permits cable sites to banish leased access to premium channels, while retaining their competitive local origination offerings on basic. In the case of Cox, New Orleans, the Media Bureau overlooked clear evidence this was done as a move to restrict commercial speech that competes with Cox's proprietary local origination channels. It is clear, that leased access law has at its basis the intent to prevent cable sites from such actions.

NCTA's request then states; *"...addition, the Order imposes sweeping new administrative burdens on cable operators."* Based on even a casual review of the petitions for relief filed in leased access matters, it is easy to see why administrative reforms were long overdue. FCC has only now forced cable to do what they know they should have been doing all along. Cable sites should have compiled the basic information on leased access immediately after the law was passed in 1984 and not now in 2008 be complaining they're finally being mandated to do so.

Then, the cable association complains they will have to *"to rearrange and remove existing programming from their channel lineups to accommodate dozens of new*

commercial leased access users who avail themselves of free channels, making it more difficult, confusing, costly, or even impossible for customers to continue watching the programming of their choice.” This is an absurd statement that should be insulting to FCC and Congress. They now have literally hundreds of channels and they can place this programming on the premium tiers where the Media Bureau feels there are enough subscribers to make these ‘genuine outlets’.

NCTA continues, *“This substantial disruption to programming line-ups will considerably diminish the attractiveness of cable service, in some cases driving customers to cable’s competitors.”* This is yet another absurd statement. They won’t be discontinuing the line-ups, they’ll be changing them and they didn’t seem to object when the Media Bureau said they could place leased access on upper stratosphere channels.

The cable group says, *“It will also rob operators of channel capacity they could otherwise use to provide advanced services like high-speed Internet access and enhanced voice. Irreparable harm will also be inflicted if cable operators are forced to disclose sensitive business information to any person who presents himself or herself as a potential commercial leased access programmer.”* Here we get to the heart of the matter. When Congress created leased access, a large number of cable sites had only 36 channels; a few had 55 channels or so. Today they have hundreds. Comcast has already ‘let the cat out of the bag’ when they replaced PEG channels

on basic analog tiers to free up bandwidth for their use for more profitable broadband services.

The statement, that harm will be inflicted if operators are forced to disclose ‘sensitive business information’ is befuddling. What ‘sensitive’ information? Members of our association have never realized we were being given ‘sensitive’ information that could harm an operator. There have been times operators have refused to tell a LAPER, how many subscribers receive the designated channels, but that information was readily available from their own ad insert sales group that uses sub counts to attract business. What other ‘sensitive’ business information will LAPers be receiving?

At this point, NCTA seems to want to make LAPA’s case for us. They state: *Cable program networks will face irreparable harm as they are relocated to digital tiers. With fewer potential viewers or, at worst, dropped altogether to make room for commercial leased access users.* This is the point LAPA tried to make when we objected to the Media Bureau order in the Cox case. NCTA then says, “*They could also face great difficulty gaining carriage in new areas, since cable operators will need to reserve enough channels for the significant numbers of new leased access requests in response to the Order’s marginal implicit fee. Losing the ability to reach their viewing audience will also inflict irreparable First Amendment harm on program networks.*” NCTA conveniently overlooks they’ve been under this same

obligation at least since 1992 and they've even at times told prospective leased access users the cable system 'had no leased access channels' available. Of course they had from 10 to 15 percent but they lied about it.

As a major leased access user, I personally find the following NCTA statement insulting; especially in light of where they have copied programming formats of LAPers for their own purposes and where they now sell hours of time direct to infomercial programmers. *The Order will also harm consumers. The new scheme will result in many cable channels filled with programming of little, if any, interest to consumers and that many subscribers may find offensive, in place of programming they watched and enjoyed or advanced services that enhance consumer welfare. None of these results comports with the statute or the public interest.*" What nerve to make such a statement when much of the programming of LAPers focusing on local content can help prevent losing customers to DBS. Long ago, Time Warner, Austin, TX. touted their local origination channels that focuses on good local content as being valuable for 'line extension and customer retention.'. My firm has witnessed subscribers' return to cable due to some local shows we aired.

NCTA conveniently rewrites part of Section 612 by changing "...at least sufficient to assure that such use will not adversely affect the operation, financial condition, or market development of the cable system," to read: *In place of Congress's directive to the Commission to "assure" that rates do "not adversely affect" a cable operator's*

“operation, financial condition, or market development,” the Commission has determined to examine only whether there is a “material” effect on the “financial health” of a cable system, a standard which it acknowledges could lead operators to experience a loss in revenue. If one will simply re-read the bold face statement preceding this, it is clear that Section 612 referred to affecting a ‘system’ not the profits of the operator. There are many things that can affect an operator’s profits that are not part of the section.

Later, NCTA further insults FCC, Congress and individual LAPers when they state: *“As the attached declarations make clear, the Order inflicts irreparable harm on cable operators and their subscribers by disrupting existing service packages and displacing popular programming with unwanted and unwatched leased access programming.”*

What ‘unwanted’ programming are they referring to? It certainly isn’t QVC or HSN or some of the questionable ‘soft porn’ channels they carry on basic...or is this what cable czars deem worthwhile content? To comment further on the redundant false and misleading statements of NCTA appears to be an exercise in futility.

Cable has manipulated the FCC staff for years and enjoyed some outlandish orders favoring cable in far too many petitions for relief. Cable has in effect told Congress to ‘go jump in the lake’ and done so behind the backs of FCC commissioners with

the assistance of staff. They've long abused the law and mistreated LAPers but now when it appears FCC has finally been forced to create rigid rules, cable cries 'foul'.

The cable industry should hang their collective heads in shame for the way they've mistreated LAPers through the years. It's amazing how cable can make their mantra cry for 'a level playing field' when faced with franchise renewals or competition from DBS or telephone, but they can't consider providing that proverbial 'level playing field' when it comes to how they treat others. It's curious as to how the heads of the cable companies sleep at night or sit in a church pew without squirming when anything about how we are to treat others is mentioned.

Our appeal from our association is that FCC does not grant NCTA any stay and that the rules proceed as adopted, until and if some court changes them.

Respectfully Submitted,

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March 31, 2008